Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

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DANIEL N. FOX, PETITIONER

V.

UNITED STATES DEPARTMENT OF JUSTICE,
RESPONDENT

---

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

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# PETITION FOR A WRIT OF CERTIORARI

AND PETITIONER'S APPENDIX

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DANIEL N. FOX
477 South Main Street
Pomona, CA 91766
(909) 629-7560
Petitioner pro se

37pp

## QUESTION PRESENTED

The District Court issued, and the Ninth Circuit Court refused to review, an order granting the FBI a stay of five years in Petitioner's 5 U.S.C. 552 and 552(a) FOIA and Privacy suit. Petitioner needs to review his files, and those of his parents, before he goes to trial soon in state court to attack their trust, which excludes him. The files record a domestic intelligence disruption and discrediting operation against Petitioner and his parents which began in 1947 when the Petitioner picketed the House Un-American Activities Committee. Is the stay order so unreasonably long as to abridge Petitioner's Fifth Amendment due process and First Amendment expression and petition rights? Does the stay of this length construe 552 and 552 (a) to a nullity?

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## PETITION

Petitioner Daniel N. Fox prays that the Supreme Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit dismissing Petitioner's appeal and filed and entered on February 21, 1995.

## OPINIONS BELOW

On December 13, 1994 the U.S. District Court for the Central District of California granted the motion of the U.S. Justice Department for a five year stay of Petitioner's Freedom of Information-Privacy Act suit. At the same time and in the same order the Court denied the motion of Petitioner for the immediate production of FBI records[1].

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1. The opinion of the District Court is set forth in Petitioner's Appendix, attached, at page 1.

Petitioner appealed to the Ninth Circuit Court of Appeals and moved that the appeal be expeditiously heard[2]. That court dismissed the appeal on February 21, 1995[3]. The Court of Appeals denied a timely motion for rehearing on March 23, 1995[4].

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2. Notice of Appeal was filed on Dec. 20, 1994. Petitioner's motion for an injunction pending appeal and an expedited hearing date for the appeal was received in the Court of Appeals on Jan. 23, 1995.

3. The judgment of the Circuit Court is attached at Petitioner's Appendix, attached, at page 7.

4. Petitioner filed in the Circuit Court a suggestion for a rehearing in banc (FRAP rule 35[b]) and a motion for rehearing (FRAP rule 40). Petitioner argued that review postponed until final judgment in the District Court would be review denied. He urged appealability under the "independent and collateral issue" doctrine of Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 545-547, 69 S. Ct. 1221, 1225-1226, 93 L.Ed. 1528 (1949). The "independent and collateral" effect, he urged, was that the stay was implicitly a decision that a six year delay did not violate 5 U.S.C. 552 and 552(a) and did not violate the Due Process clause of the Fifth Amendment or other constitutional guarantees cited by petitioner in his appeal. The Circuit Court denied the petition for rehearing on March 23, 1995. The order of the Circuit Court denying rehearing is set forth in Petitioner's Appendix, attached, at page 8.

## JURISDICTION STATEMENT

The District Court order staying Petitioner's FOIA suit for five years is dated Dec. 13, 1994. The Circuit Court for the Ninth Circuit dismissed Petitioner's appeal on Feb. 21, 1995. The Petitioner's petition for a rehearing was denied on March 23, 1995.

## STATUTES INVOLVED

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). The jurisdiction of the District Court was invoked under 5 U.S.C. 552 and 552(a).

## STATEMENT OF THE CASE

Petitioner first requested FBI documents on July 26, 1993[5]. Suit was filed in District Court on July 11, 1994. The jurisdiction of

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5. District Court order dated Dec. 13, 1994, appendix page 3 , line 5 .

the district court was invoked under the Freedom of Information Act (5 U.S.C. 552) and the Privacy Act (5 U.S.C. 552 a). These acts facially require the agency to determine compliance within 10 days of request[6]. The FBI reported to the district court that it had located 300 pages of the requested documents[7]. A letter from the FBI after commencement of suit stated that a related file existed in the name of Petitioner's mother[8]. The files record an FBI domestic intelligence disruption operation against Petitioner and his parents in the 1940's and 1950's. The operation

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6. 5 U.S.C. 552 provides: "Each agency---- shall--determine within ten days (excepting Saturdays, Sundays and legal public holidays) after the receipt of any such request and shall immediately notify the person making such request of such determination and the reasons therefor,--------". (5 U.S.C. 552(a)(6) ).

7. District Court order dated Dec. 13, 1994, at appendix page 3, line 9 .

8. The letter is dated Dec. 5, 1994. It is attached at Petitioner's Appendix at page 18. The existence of files on both Petitioner and his mother are suggestive of the pervasive and intrusive nature of the original intelligence operation.

started when the 17 year old Petitioner picketed the House Un-American Activities Committee[9]. It continued while the Petitioner was an undergraduate and law student at the University of Chicago[10]. The operation

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9. In a declaration dated Nov. 1, 1994 filed in District Court Petitioner stated that: "In 1947, at age 17, and while a 12th grade student---I participated in a public peaceful demonstration against the House Un-American Activities Committee in downtown Los Angeles. After that FBI special agents began a series of visits to my father and mother. The effect on my family was catastrophic."

10. In his Dist. Ct. declaration dated Nov. 1, 1994 Petitioner described the continuation of the FBI operation while he was enrolled in the College and Law School of the University of Chicago. In his declaration in the District Court in support of Petitioner's motion for immediate production former FBI special agent M. Wesley Swearingen stated that: "Any individual who expressed their opinion against the House Committee on Un-American activities, no matter how private that person believed his or her thoughts were, became a target of the FBI." Mr. Swearingen also stated: "During my time as an FBI special agent the youth of a target individual was no bar to FBI disruption." He also stated: "Frequently the FBI will attempt to delay exhibiting files to a requester by claiming that it has too much work to do. In many cases this is a subterfuge whose purpose is simply to prevent the disclosure of matters the FBI wishes not to disclose."

discredited the Petitioner[11]. His family was alienated from him. He was disinherited in his parents' trust[12]. He is now aged 65[13]. The FBI represented that plaintiff's request would come up in its "queue" not before January, 1999 at the earliest[14]. This was unacceptable to the Petitioner. Petitioner filed a motion for immediate production and the Justice Department filed a motion for a 5 year stay order. In the motion proceedings Petitioner urged that he had an exceptional and urgent need for the immediate production

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11. In his District Court declaration Petitioner stated: "I was never able to overcome the effects of the intrusion by the United States government on my relationship with my [parents]".
12. The facts concerning the excising trust were presented to the District Court in Petitioner's declaration of Nov. 1, 1994.
13. This fact was set forth in the Nov. 1, 1994 District Court declaration.
14. This assertion was made by the Justice Department to the District Court and is reflected in the District Court order which states: "[The FBI] confirms that it will not be able to process the request until 1999----." See, District Court order, set forth in Petitioner's Appendix at page 6, line 5.

of the documents. The motions were decided against Petitioner on December 13, 1994. The District Court decision is set forth herein in Petitioner's Appendix at page 1. The decision operates to give the FBI a total of six years after request to consider[15] production. Petitioner fully explained in his District Court motion that he needed the FBI materials promptly to attack the validity of the disinheriting trust in state court. At present writing a trial date is to be set in state court on June 28, 1995.

## REASONS FOR GRANTING THE PETITION

The time schedule proffered by the FBI, and upheld by the District and Circuit court orders, for processing the FOIA and Privacy Act requests, is so unreasonably long that it will cause extreme hardship to Petitioner.

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15. In its presentation to the District Court the FBI did not state it would produce the documents in 1999, it stated it would consider doing so in 1999.

The order if allowed to stand will encourage the FBI to obstruct other requesters with similarly long delays. The disclosure statutes will be emasculated. Petitioner has shown an exceptional and urgent need for the documents[16].

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16. In Open America v. Watergate Special Prosecution Force, 547 F.2d 605 (D.C. Cir. 1976) the Court stated: "We believe also that Congress wished to reserve the role of the courts for two occasions, (1) when the agency was not showing due diligence in processing plaintiff's individual request or was lax overall in meeting its obligations under the Act with all available resources, and (2) when plaintiff can show a genuine need and reason for urgency in gaining access to government records ahead of prior applicants for information." Petitioner here urges that he has brought himself under the second instance. The circumstances here provide Petitioner with a strong justification, apart from his age, for obtaining the documents in an expedited manner.
In 1947 at age 17 and while a 12th grade high school student petitioner participated in a public peaceful protest demonstration against the House Un-American Activities Committee. In a newspaper article with photograph dated May 16, 1947, presented to the District Court in Petitioner's declaration dated Nov. 1, 1994, petitioner was shown carrying a sign which stated: "Democracy and Thought Control Don't Jibe, Let's Keep the Constitution Alive". Thereafter as Petitioner declared in his Nov. 1, 1994 declaration, the FBI began a

The district court denied petitioner's motion for immediate production by stating "[E]xpeditious production is not necessary in

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series of visits to his father and mother. The FBI operation continued while petitioner was an undergraduate and law student at the University of Chicago. (Petitioner's declaration on file in the Dist. Ct. dated Nov. 1, 1994). The effect of FBI intervention upon Petitioner's family was catastrophic. Petitioner was profoundly discredited. (declaration, Dist. Ct.) At the present time apparently the FBI maintains a separate file for petitioner's mother which is cross-indexed to the name of Petitioner. (See, copy of FBI letter of Dec. 5, 1994, attached at Petitioner's Appendix, at page 18. The family alienation which resulted was little attenuated despite the passing of many decades. (Declaration of Petitioner for District Court, dated Nov. 1, 1994). Presently the parents' trust excises petitioner from benefits. (Declar. of Petitioner, 11/1/94). Petitioner has pending a challenge of the excising trust in state court. He claims that (1) the trust may not be enforced because it is void as against public policy, and (2) is the result of undue influence. He claims in state court that the trust is the result of FBI retaliation against him for exercising his first amendment rights of expression and his right to petition the government for redress of grievances. Trial of this issue is presently calendared in state court for June 6, 1995.

this case.---" Citing the D.C. Circuit in Open America v. Watergate Special Prosecution Force, 547 F.2d 605 (D.C. Cir. 1976), the District Court further stated that "[I]t is not appropriate for the Court to order the FBI to disrupt its routine simply to accommodate Fox, particularly when Fox has not offered a strong justification for obtaining the documents in an expedited manner." The Court went on to say: "In Fox's case, no safety concerns are at issue. Due process concerns are also not in issue. The state court granted summary judgment against Fox in his trust action. Thus, that action is completed, and Fox has not suggested how he might further pursue the trust action."[17]

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17. In his District Court submissions Petitioner explained that the summary judgment against him was on a subsidiary issue of his standing to present evidence to remove the present trustee of the trust. He fully explained that the issue of the validity and enforcement of the trust remained to be tried. See, Petitioner's declaration and points and authorities in support of his motion for order of immediate disclosure of the records.

The District Court was in error. The state court action is not completed. Petitioner made a clear showing in the record of the District Court that the state court action was not completed, that the trust validity issue remained for trial, that trial was imminent and that he needed the FBI documents for that trial[18].

In dismissing Petitioner's appeal the Circuit Court stated that the District Court five year stay order was not a final order[19]. The Circuit Court was in error. The practical individual effect of the order on Petitioner is to deprive him of the records he needs in state court in time to use them. The order also has an independent and collateral effect of national importance[20]. This effect is to

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18. Please refer to note 17, above.
19. Circuit Court order dated Feb. 21, 1995 at Petitioner's Appendix, page 14.
20. Please refer to note 4 above concerning the "independent and collateral" issue.

render ineffectual the Freedom of Information and Privacy Acts both for Petitioner and for other requesters nationwide.

A reasonable delay would not nullify the acts. However, under the circumstances of this case, where the Petitioner is 65 years old and where his need is imminent in state court, a five year delay is so unreasonable as to be unconscionable and an abridgment of the Due Process Clause of the Fifth Amendment to the United States Constitution and an abridgment of Petioner's First Amendment rights of expression and petition.

Where the practical consequences of a stay of proceedings may be the termination of the action and a final bar to disclosure of

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doctrine of Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 545-547, 69 S. Ct. 1221, 1225-1226, 93 L.Ed. 1528 (1949). Petitioner cited the collateral effect of the dismissal and the Cohen case in his petition for rehearing submitted to the Circuit Court.

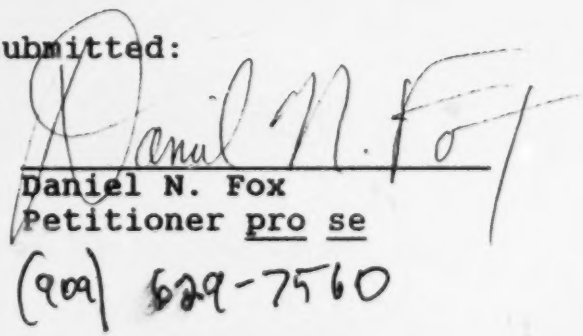
the sought records the stay order should be deemed final for the purpose of appeal by writ of certiorari. See, U.S. v. Berkowitz, CA3d, 1964, 328 F2d 358, 360. Cert. denied 85 S.Ct. 42, 379 U.S. 821, 13 L.Ed 2d 32.

The nationwide practical effect of the granting of a five year stay in this case compromises the efficacy of the disclosure statutes such that an important public question is raised.

## CONCLUSION

A writ of certiorari should be issued to the U. S. Court of Appeals for the Ninth Circuit requiring the Circuit Court expeditiously to hear petitioner's appeal of the stay of proceedings in District Court.

Respectfully submitted:



Daniel N. Fox
Petitioner pro se
(909) 629-7560

DANIEL N. FOX
Attorney at Law
477 S. Main St.
Pomona, California 91766

No._____

In The

# SUPREME COURT OF THE UNITED STATES

October Term, 1994

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DANIEL N. FOX, PETITIONER

V.

UNITED STATES DEPARTMENT OF JUSTICE, RESPONDENT

---

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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# PETITIONER'S APPENDIX

[Filed, Clerk U.S. District Court, Dec. 14 1994 Central Dist. of California by:]

[Entered, Clerk, U.S. Dist. Court Dec. 16, 1994]

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

| | | |
|---|---|---|
| DANIEL N. FOX, | ) | CV-94-4622 JMI (JRx) |
| | ) | |
| Plaintiff, | ) | ORDER DENYING |
| | ) | PLAINTIFF'S |
| | ) | MOTION FOR IMMEDIATE |
| v. | ) | PRODUCTION OF |
| | ) | DOCUMENTS |
| | ) | |
| UNITED STATES | ) | |
| DEPARTMENT OF | ) | |
| JUSTICE, | ) | ORDER DENYING |
| | ) | PLAINTIFF'S |
| | ) | MOTION FOR A VAUGHN |
| | ) | INDEX |
| | ) | |
| Defendant. | ) | ORDER GRANTING |
| | ) | DEFENDANT'S |
| | ) | MOTION FOR A STAY OF |
| | ) | PROCEEDINGS |

IT IS HEREBY ORDERED:

Plaintiff DANIEL N. FOX'S

(hereinafter "Fox") Motion under Open

America v. Watergate for order that FBI Produce Documents Immediately Because of Plaintiff's Exceptional and Urgent Need, plaintiff's motion under Vaughn v. Rosen, to Require Detailed Justification, Itemization and Indexing, and defendant UNITED STATES DEPARTMENT OF JUSTICE's Motion for a Stay of Proceedings came before this Court for review on December 5, 1994. After careful consideration, the Court hereby DENIES plaintiff's motions and GRANTS defendant's motion.

## BACKGROUND

Plaintiff Daniel N. Fox is an attorney representing himself in this action against the Federal Bureau of Investigation (FBI) under the Freedom of Information Act, 5 U.S.C. sec. 552. On July 26, 1993, Fox asked the FBI to release to him all of the documents in its possession that pertain to him. The FBI uncovered over 300 pages of documents relating to Fox, but the FBI has not yet turned over the documents. The FBI contends that it is operating under a considerable backlog of requests and does not expect to be able to process Fox's request until 1999.

Fox claims that he needs the documents to challenge the validity of his parents' trust from which he is excluded. He maintains that after he

participated in a peaceful protest against the House Un-American Activities Committee in downtown Los Angeles in 1947, the FBI began investigating him. As part of the investigation, FBI agents spoke to his parents, and according to Fox, once his parents learned of his involvement, their relationship with Fox deteriorated. Fox asserts that his parents excluded him from the trust because their relationship with him never improved. Fox's father died in 1987, and his mother is now 91 and incompetent.

Fox is suing in Federal Court for an injunction to prevent the FBI from withholding the documents. Fox argues that he needs the documents for an action that he recently brought in Los Angeles County Superior Court. In that action, Fox challenged the validity of the trust

and accused the trustee of misappropriation of $2,000,000 in trust funds. On September 26, 1994, the state court granted summary judgment in favor of the trustee. In Fox's opinion, he would not have lost the suit if he had been able to introduce the FBI documents into evidence. He intends to pursue the action further, and in light of his mother's advanced age, places a sense of urgency on the case. Therefore, he now brings this motion for a court order mandating immediate production of the documents. He also requests that the Court order the FBI to prepare a Vaughn index[1].

---

1. Pursuant to Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973) cert. denied, 415 U.S. 977 (1974), an agency may be ordered to prepare for a person requesting documents a list of all withheld documents with explanations of the claimed exemptions.

The FBI contends that it is processing Fox's request as quickly as possible. It presents evidence of request backlog and budgetary constraints to support this assertion. It confirms that it will not be able to process the request until 1999 and seeks a stay of these proceedings until then.

DISCUSSION

This case is governed by Open America v. Watergate Special Prosecution Force, 547 F.2d 605 (D.C. Cir. 1976). In that case, the Court interpreted the FOIA's exemptions to the requisite ten-day and twenty-day periods for processing of requests. See, 5 U.S.C. sec. 552(a)(6)(A). Section 552 (a)(6)(C) states that "[i]f the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may

retain jurisdiction and allow the agency additional time to complete its review of the records." 5 U.S.C. sec. 552 (a)(6)(C). The Court held that "exceptional circumstances exist" when an agency,.....is deluged with a volume of requests for information vastly in excess of that anticipated by Congress, when the existing resources are inadequate to deal with the volume of such requests within the [statutory time limits], and when the agency can show that `it is exercising due diligence' in processing the requests." Open America, 547 F.2d at 616. The Court found that such conditions existed at the FBI, which, at the time, had a backlog of 5,137 requests. Currently, that backlog has increased to 11, 828. See, Declaration of Nancy L. Steward (hereinafter "Steward Declaration"), p. 11.

The Ninth Circuit adopted a qualified version of the Open America approach in Exner v. FBI, 542 F.2d 1121 (9th Cir. 1976). It held that "the `first-in, first-out' consideration of demands, based on date of filing with the FBI, ordinarily seems reasonable, and we hold that the filing of suit by a person demanding information can (but does not necessarily) move such petitioner `up the line.'" Id. at 1123.

The FBI has demonstrated the existence of the factors listed in the Open America opinion. It becomes clear after reading the Steward Declaration that with over 11,000 requests and a small staff that Congress refuses to expand, considerable delay in processing of requests is to be expected. Neither

Fox nor the FBI has presented any evidence calling into question the FBI staff's exercise of due diligence in processing these requests. The issue, then, is whether the Court should expedite Fox's request because he has filed this suit and because he has pending state court litigation.

Expeditious production is not necessary in this case. As the D.C. Circuit in Open America suggested, it is undesirable to have the courts handle "the regulation of priorities in all agencies." Open America, 547 F.2d at 615. It is not appropriate for the Court to order the FBI to disrupt its routine simply to accommodate Fox, particularly when Fox has not offered a strong justification for obtaining the documents in an expedited manner.

In a 1983 FOIA Update, the Department of Justice (DOJ) suggested some guidelines for determining when requests should be expedited. See, Defendant's Opposition to Plaintiff's Motions Requesting Order that FBI produce Documents Immediately and Order that the FBI Prepare Vaughn Index and Defendant's Reply in Support of Defendant's Motion to Stay Action, p. 11. The DOJ indicated that expedited processing should occur when an "individual's life or personal safety would be jeopardized by the failure to process a request immediately." Id. In addition, requests should be expedited if "substantial due process rights of the requester would be impaired by the failure to process immediately and that the information sought is not otherwise available." Id. It is not enough, however, "for a

requester merely to allege that requested records are `needed' in connection with some judicial or administrative proceeding." Id. In Fox's case, no safety concerns are at issue. Due process concerns are also not at issue. The state court granted summary judgment against Fox in his trust action. Thus, that action is completed, and Fox has not suggested how he might further pursue the trust action. Moreover, it is not clear to the Court how the presence of the documents could substantially change the outcome of the state court litigation. Therefore, this case does not appear to fall within the DOJ guidelines listed above. It is not necessary to order the FBI to expedite Fox's request.

Because the request has not yet been processed, a Vaughn Index is not

necessary. The FBI is not actively withholding documents from Fox. It simply has not yet processed his request. When the request is processed, if the FBI chooses to withhold documents, then a Vaughn Index may be necessary. At this time, the Court will not order that one be prepared.

The Court grants defendant's motion and stays this case. Defendant is ordered to file a status report no later than Friday, December 1, 1995 informing the Court of any progress made in the processing of Fox's request. Because an expedited processing of the request and a Vaughn Index are not presently necessary,

the Court denies Plaintiff's motions.

IT IS SO ORDERED:

Dated: December 13, 1994

/s/
James M. Ideman
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
Feb. 21, 1995
Cathy Catterson, Clerk
U.S. Court of Appeals

| | |
|---|---|
| DANIEL N. FOX, | No. 94-56788 |
| Plaintiff, Appellant | DC# CV-94-04622-JMI Central, California (Los Angeles) |
| v. | |
| UNITED STATES DEPARTMENT OF JUSTICE | |
| Defendant, Appellees | ORDER |

Before: SCHROEDER, CANBY and LEAVY, Circuit Judges

A review of the record in this case demonstrates that this court lacks jurisdiction over this appeal because the order appealed from is not final or appealable. See 28 U.S.C. sec. 1291; Chronicle Publishing Co. v. National Broadcasting Co., 294 F.2d 744, 746 (9th Cir.

1961) (order staying district court proceedings not appealable). Consequently this appeal is dismissed for lack of jurisdiction. All pending motions are denied as moot.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
Mar. 23, 1995
Cathy Catterson, Clerk
U.S. Court of Appeals

| | | |
|---|---|---|
| DANIEL N. FOX, | ) | No. 94-56788 |
| | ) | |
| Plaintiff, Appellant | ) | DC# CV-94-04622-JMI |
| | ) | Central, |
| | ) | California |
| v. | ) | (Los Angeles) |
| | ) | |
| UNITED STATES DEPARTMENT OF JUSTICE | ) | |
| | ) | |
| Defendant, Appellees | ) | ORDER |

Before: SCHROEDER, CANBY and LEAVY, Circuit Judges

Appellant's petition for rehearing with suggestion for rehearing in banc, construed as a motion for reconsideration of this Court's February 21, 1995 order dismissing this appeal for lack of jurisdiction, is denied.

No motions for reconsideration, rehearing, clarification, stay of the mandate, or any other submissions shall be filed or entertained in this closed docket.

(copy)

U.S. Department of Justice

(Seal)

Federal Bureau of Investigation

In reply Please Refer to
File No. 190-LA-161438

11000 Wilshire Blvd.
Los Angeles, CA 90024
December 5, 1994

Daniel N. Fox
Main Mission Building
477 South Main Street
Pomona, CA 91766

Re: RAE FOX AKA: RACHEL EPSTEIN

Dear Mr. Fox:

This letter is in response to your letter dated November 17, 1994, and received by our office on November 21, 1994.

A cross-reference was located pertaining to the subject of your request and this reference will be processed by FBI Headquarters, Washington, D.C.

A cross-reference is defined as "a mention of the subject of your request in a file in another individual, organization, event, activity or the like."

Your patience and cooperation will be appreciated.

Sincerely,

CHARLIE J. PARSONS
Special Agent in Charge

by: (\s\Luis G. Flores)

LUIS G. FLORES
Principal Legal Advisor